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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 193 192

JOSHUA F. SIMONS, WILLIAM MARKOWITZ and SAMUEL MARKOWITZ,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND SUPPORTING BRIEF.

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JOSHUA F. SIMONS, WILLIAM MARKOWITZ and SAMUEL MARKOWITZ,

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UNITED STATES OF AMERICA,

Respondent.

PETITION.

To the Honorable, The Supreme Court of the United States:

Joshua F. Simons, William Markowitz and Samuel Markowitz, the above named petitioners, pray that a writ of certiorari be issued by this Court to review a judgment of the Circuit Court of Appeals for the Ninth Circuit, entered on the 21st day of April, 1941, affirming a judgment of the United States District Court for the Western District of Washington, Southern Division [R. 1999-2000], and in this behalf petitioners respectfully show:

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals was filed on April 21, 1941, and is found in the record at pages 1944 to 1999.

Within the time allowed by law and on May 17, 1941, petitioners filed in said Court a petition for rehearing which was denied on May 22, 1941 [R. 2000].

Jurisdiction.

This Court has jurisdiction by virtue of the provisions of subdivision (a) of Section 240 of the Judicial Code as amended by the Act of February 13. 1925, c. 229, §1, 43 Stat. 938; 28 U. S. C. A. 347.

Statement of the Case.

1. The Circuit Court of Appeals affirmed the convictions and sentences of the petitioners on thirteen counts of an indictment which contained charges as follows:

Counts 1 to 10, inclusive, using the United States mails in furtherance of a scheme to defraud.

Counts 11 and 12, employing the said scheme and artifice to defraud, in the sale of a security by the use of the United States mails, in violation of the Securities Act of 1933, as amended.

Count 13, conspiring to use the United States mails in furtherance of a scheme and artifice to defraud and to employ the said scheme and artifice in the sale of a security by means of the United States mails.

2. The sentences affirmed were as follows:

JOSHUA F. SIMONS.

On each of counts 1 to 10 inclusive, imprisonment in a United States penitentiary for five years and a fine of $1,000.00; the sentences of imprisonment to run concurrently each with the others.

On counts 11 and 12, imprisonment in a United States penitentiary for one year and one day to run concurrently one with the other, but consecutively to the sentences of imprisonment imposed on counts 1 to 10 inclusive.

On count 13, imprisonment in a United States penitentiary for a period of two years to run consecutively to the sentences of imprisonment imposed on counts 11 and 12.

Petitioner Simons is therefore sentenced to imprisonment aggregating eight years and one day, and to pay fines totaling $10,000.00 [R. 188-93].

WILLIAM MARKOWITZ.

On each of counts 1 to 10 inclusive, imprisonment in a United States pententiary for five years and a fine of $1,000.00: the sentences of imprisonment to run concurrently each with the others.

On counts 11 and 12, imprisonment in a United States penitentiary for one year and one day to run concurrently one with the other, but consecutively to the sentences of imprisonment imposed on counts 1 to 10 inclusive.

On count 13, imprisonment in a United States penitentiary for a period of two years to run con-

secutively to the sentences of imprisonment imposed on counts 11 and 12.

Petitioner William Markowitz is therefore sentenced to imprisonment aggregating eight years and one day, and to pay fines totaling $10,000 [R. 183-88].

SAMUEL MARKOWITZ.

On counts 11 and 12, imprisonment in a United States penitentiary for one year and one day; the sentences to run concurrently one with the other.

On count 13, imprisonment in a United States penitentiary for two years to run consecutively to the sentences imposed on counts 11 and 12.

Petitioner Samuel Markowitz is, therefore, sentenced to imprisonment aggregating three years and one day [R. 181-82].

3. Count 1 charges that the petitioners and others used the United States mails in furtherance of a scheme and artifice to defraud [R. 3 *et seq.*]. It is not necessary, for the purpose of presenting the points upon which this petition is based, to describe in detail either the scheme or the means intended to be employed for carrying it out.

4. Counts 2 to 10 inclusive, each charges the mailing of a different letter in furtherance of the said scheme and artifice [R. 24-54].

5. Counts 11 and 12 charge the use and employment of the said scheme and artifice in the sale of a security by the use of the mails [R. 54-66].

6. Count 13 charges a conspiracy to use the United States mails in furtherance of the said scheme and artifice and to employ the said scheme and artifice in the sale of a security by use of the mails [R. 66-74].

7. The trial of this cause commenced on February 14, 1939 [R. 397], and the plaintiff rested its case on July 24, 1939 [R. 1828]. During this period of approximately five and one-half months, 127 witnesses were called by the plaintiff [R. viii to xxv]. The testimony of these witnesses covered approximately 8,000 typewritten pages of transcript [R. 1855]. During the examination of these witnesses the plaintiff introduced 619 documentary exhibits [R. 1772] and 286 such exhibits were introduced by defendants [R. ii].

Each of the defendants rested his case without testifying or calling any witness.

The cause was partially argued [R. 1844] and on July 31, 1939, the trial was continued until August 9, 1939, because of the illness of the Honorable Edward E. Cushman, the Judge presiding at the trial [R. 1844].

On August 9, 1939, Judge Cushman was still too ill to preside at said trial [R. 1862]. On that date Court was convened by the Honorable Leon R. Yankwich, Judge of the District Court of the United States for the Southern District of California, who had been theretofore designated and appointed to sit in the United States District Court for the Western District of Washington [R. 1844-45].

Each attorney in the case, and each defendant thereupon stipulated, both in writing and orally in open Court, that Judge Yankwich might conclude the trial in the place and stead of Judge Cushman, and each of them signed a stipulation which contained the statement that they waived "any and all legal and constitutional rights which they may have or might have by reason of the substitution * * *" [R. 1846-64, incl.]. Thereafter, a typewritten transcript of the testimony and the exhibits which had theretofore been admitted in evidence, were furnished to and read by Judge Yankwich [R. 1864].

On August 14, 1939, the trial was resumed with Judge Yankwich presiding [R. 1863], and the arguments were completed and Judge Yankwich instructed the jury [R. 1869].

The Question Presented.

The situation disclosed by the foregoing facts raises the question of whether the substitution, pursuant to stipulation and after all the evidence had been taken, of one judge for another in the course of the trial of a criminal case before a jury, and the instruction of the jury by the substituted judge who had not seen the witnesses nor heard their testimony but had merely read it, deprived petitioners of their constitutional right to trial by jury, or is such a departure from established judicial procedure as to deprive the petitioners of their liberty without due process of law.

Reasons for Granting the Writ.

I.

THE CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The question of whether one judge may, pursuant to stipulation and after all the evidence has been taken, be substituted for another in the trial of a criminal case before a jury, and the jury be instructed by such substituted judge, who has not seen the witnesses nor heard their testimony but has merely read it, is an important one which has never been, but should be, settled by this Court.

II.

THE CIRCUIT COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH A DECISION OF ANOTHER CIRCUIT COURT OF APPEALS ON THE SAME MATTER.

The Circuit Court of Appeals in this case decided that the substitution, pursuant to stipulation and after all the evidence had been taken, of one judge for another in the trial of a criminal case before a jury, and the instruction of the jury by such substituted judge, who had not seen the witnesses nor heard their testimony but had merely read it, did not deprive petitioners of their constitutional right to trial by jury, nor deny to them due process of law.

This decision is directly in conflict with a decision of the Circuit Court of Appeals, for the Second Circuit. In *Freeman v. United States,* 227 Fed. 732, that Court reversed a conviction in a criminal case because of the substitution of one trial judge for another in a like situation.

III.

THE CIRCUIT COURT OF APPEALS HAS SO FAR SANCTIONED SUCH A DEPARTURE BY A LOWER COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The substitution of one judge for another, pursuant to stipulation and after all the evidence has been taken, in the trial of a criminal case before a jury and the instruction of the jury by such substituted judge, who has not seen the witnesses nor heard their testimony but has merely read it, is such a departure from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision.

Wherefore, it is respectfully submitted that this petition should be granted and a Writ of Certiorari issue to the Circuit Court of Appeals for the Ninth Circuit.

MARK L. HERRON,
Attorney for Petitioners.